

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED
2018 DEC -3 A 11:43
CATHY S. G. TSONI, CLERK
KANAWHA COUNTY CIRCUIT COURT

HEATHER SHARP-SPINKS,
TABBY SMITH, and
AMBER CHAPMAN,

Plaintiffs,

v.

Civil Action No. 18-C-1418
Hon. Jennifer Bailey

WEST VIRGINIA SCHOOL
BUILDING AUTHORITY,

Defendant.

DEFENDANT'S MOTION TO DISMISS

Comes now the Defendant, the West Virginia School Building Authority, by counsel, Kelli D. Talbott, Senior Deputy Attorney General, pursuant to Rule 12(b)(1) (lack of jurisdiction over the subject matter) and 12(b)(4) (insufficiency of process) of the West Virginia Rules of Civil Procedure; pursuant to West Virginia Code § 55-17-4(1); and, pursuant to the doctrine of mootness/non-justiciable controversy, and moves to dismiss this action. In support of its motion, the Defendant states as follows:

I.

BACKGROUND

On June 23, 2016 flooding occurred in Nicholas County causing widespread and catastrophic damage, including damage to Richwood High School, Richwood Middle School and Summersville Middle School. The flood damage rendered the schools unusable.

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On June 26, 2016, the President of the United States issued a natural disaster declaration as a result of the flooding that damaged the schools in Nicholas County. Thereafter, the damaged schools in Nicholas County became eligible for Federal Emergency Management Agency (FEMA) monies. Pursuant to West Virginia Code § 18-9D-15(a), the Defendant is charged with administering all federal funds provided for the construction and improvement of school facilities in the State. Therefore, the State of West Virginia is considered the recipient or grantee of the FEMA funds and the Defendant is considered the sub-recipient or sub-grantee of the FEMA funds that are provided for the Nicholas County schools.

Because the formerly operational Richwood High School and Richwood Middle School are in the flood way and flood plain, the schools cannot be rebuilt on the existing sites and be eligible for FEMA funds. The former Summersville Middle School is not in the floodway and was therefore deemed eligible for "replacment" FEMA funds. FEMA's "428" program allows grantees to consolidate and pool FEMA grant funds and utilize them for a different project or projects, other than the one-for-one rebuilding of individual schools.

The Nicholas County Board of Education initially proposed to use FEMA "428" funds to build a consolidated high school and consolidated middle school at Glade Creek, near Summersville. This plan would have created a situation wherein there would be no high school or middle school in the Richwood attendance area. However, the West Virginia Board of Education disapproved the County Board's proposed facilities plan, which resulted in litigation culminating in the West Virginia Supreme Court's decision in *West Virginia Board of Education v. Board of Education of the County of Nicholas*, 806 S.E.2d 136 (W. Va. 2017). In that decision, the Supreme Court upheld the State Board's authority to disapprove the plan.

In the aftermath of the Supreme Court decision, the State Board and the County Board engaged in an extensive process with mediators employed by FEMA to try to come to a resolution on an acceptable plan for addressing the flooded schools in Nicholas County. Ultimately, the mediation resulted in a proposed plan to utilize FEMA "428" funds to construct one community school in the Richwood attendance area to accommodate grades 6 through 12, and a middle school and high school near the geographic center of Nicholas County with a career-technical education program.

On May 7, 2018, the Nicholas County Board of Education voted to amend its Comprehensive Educational Facilities Plan (CEFP) to include the mediated plan. On May 9, 2018, the West Virginia Board of Education voted to approve this CEFP amendment. Thereafter, on May 10, 2018, the Defendant approved the CEFP amendment.

The State of West Virginia then made application to FEMA for a grant of "428" funds to implement the plan. Ultimately, FEMA granted approximately \$159.8 Million Dollars, which the County Board voted to accept on September 4, 2018. Thereafter, that same day, the Defendant held a meeting and voted its approval. Plaintiffs' counsel was in attendance at the September 4, 2018 meeting of the Defendant.

On September 25, 2018, the Defendant received a notice from James Barber, pursuant to West Virginia Code § 55-17-3, indicating that he intended to sue the Defendant on behalf of unidentified parties alleging that the Defendant had violated the West Virginia Open Governmental Proceedings Act (the Act) in connection with its September 4, 2018 meeting. (See attached Exhibit 1.) In his notice, Mr. Barber did not identify exactly what he was alleging that the Defendant did to violate the Act. However, the Defendant's undersigned counsel contacted Mr. Barber and discussed

the matter with him at which time he asserted that the notice of the September 4, 2018 meeting was deficient and that he was going to allege that the notice violated the Act. In addition, Mr. Barber informed the undersigned that the only issue his unnamed clients had with the underlying plan to be funded by FEMA was with the proposed building site for the new community school in the Richwood attendance area. Therefore, Mr. Barber generally stated that his clients would be seeking to set aside the approval/acceptance of the \$159.8 Million Dollar FEMA grant in order to leverage a change in the building site.

After considering the matter and discussing the matter with FEMA officials, the Defendant determined to “re-do” its meeting to vote upon the matter out of an abundance of caution. Clearly, the Defendant did not wish to bear any risk of forfeiting \$159.8 Million Dollars in federal funds for the benefit of the school children in Nicholas County because of any alleged deficiencies in its meeting notice.¹ Moreover, FEMA expressed no concerns or issues with the Defendant’s proposal to take a another vote on the matter. Defendant’s counsel informed Mr. Barber that Defendant intended to have another meeting to vote upon the matter. Indeed, Mr. Barber is quoted in an interview with the Charleston Gazette, published on or about October 16, 2018, as follows: “The Monday meeting moots the suit, so the suit’s never going to be filed.” (See attached Exhibit 2.)

On October 22, 2018, the Defendant held a duly noticed public meeting at which it considered the approval/acceptance of the \$159.8 Million Dollar FEMA grant for the benefit of the school children and citizens of Nicholas County. Plaintiff’s counsel, Mr. Barber, spoke at the meeting, as did another person who Mr. Barber introduced to the members of the School Building

¹ The Defendant does not admit that its notice violated the Act. And, as will be set forth in this Motion, the Defendant’s position is that the Court need not decide whether or not it did.

Authority. The upshot of the presentations made by Mr. Barber and his associate was that the Richwood community school should be located at a site other than the one proposed in connection with the "428" grant. After hearing the presentations and considering the matter, the Defendant again voted to approve the \$159.8 Million Dollar FEMA grant. The Defendant made an audio recording of the meeting and has retained it. The October 22, 2018 meeting of the Defendant was fully compliant with the Act and the Plaintiffs do not contend otherwise in their Complaint.

FEMA officials have taken no action to void or set aside the grant because of the alleged deficiencies in the Defendant's meeting notice for the September 4, 2018 meeting. And, as stated above, FEMA officials were made aware that the Defendant was holding a second meeting to take the matter up again. While FEMA had established an administrative deadline of September 25, 2018 for the parties to agree to the "428" grant, FEMA expressed no issues with the Defendant's action of October 22, 2018 which ratified and affirmed its agreement to the grant in early September. Indeed, the Plaintiffs concede as much in their Complaint in Paragraph 21 wherein they quote FEMA's statement issued in this matter.

Despite the foregoing, the Plaintiffs have now filed this action against the Defendant seeking to have this Court issue an advisory opinion on a moot question as to whether the Defendant's meeting notice for the September 4, 2018 meeting violated the Act. How this might benefit the Plaintiffs is unknown since FEMA, who is not a party to this action, has accepted the County Board's and the Defendant's agreement to the "428" funds despite the Plaintiffs' claims about the September 4, 2018 meeting.

II.

ARGUMENT

- A. THE DEFENDANT'S STATUTORY TIME PERIOD TO ANSWER OR FILE A RESPONSIVE PLEADING TO PLAINTIFFS' COMPLAINT IS SIXTY DAYS PURSUANT TO WEST VIRGINIA CODE § 55-17-4(1); THEREFORE THE SUMMONS ISSUED IN THIS MATTER REQUIRING THE DEFENDANT TO ANSWER WITHIN TWENTY DAYS IS CONTRARY TO LAW, MUST BE QUASHED AND WARRANTS DISMISSAL OF THIS ACTION.**

The Summons served upon the Defendant is defective. The Summons with which the Defendant was served contains a twenty day return date for an answer to the Complaint. Pursuant to West Virginia Code § 55-17-4(1), "[a] government agency shall be allowed sixty days to serve an answer to a complaint or petition for which a summons has been issued and served upon a government agency."

Accordingly, the twenty day answer period on the Summons in this matter is contrary to law. Because the Summons is legally defective, process is insufficient under Rule 12(b)(4). Therefore, this Court must quash the Summons and dismiss this action from the docket of the Court.

- B. THE PLAINTIFFS SEEK THE ISSUANCE OF AN ADVISORY OPINION FROM THIS COURT ON AN ISSUE THAT IS MOOT.**

The Plaintiffs seek to have this Court decide an issue that is moot. Specifically, the Plaintiffs ask this Court for a declaration that the Defendant violated the Open Governmental Proceedings Act (the Act), West Virginia Code §§ 6-9A-1 *et seq.*, in connection with its September 4, 2018 meeting and a declaration that the action taken at such meeting is void.

However, the Plaintiffs concede that the Defendant had another meeting on October 22, 2018 at which it took another vote on exactly the same agenda item. And, the Plaintiffs do not allege that anything that the Defendants did at its October 22, 2018 meeting was in violation of the Act. In effect, the Plaintiffs concede that the October 22, 2018 meeting was compliant with the Act. Nonetheless, the Plaintiffs want this Court to reach back, despite the “do-over,” and declare that the September meeting was in violation of the Act.

The West Virginia Ethics Commission, the body charged with issuing advisory opinions on the Act pursuant to West Virginia Code § 6-9A-11, has specifically held that a public body can “cure” any alleged violations of the Act by taking the remedial action of having another timely and adequately noticed meeting. *Open Meetings Advisory Opinion* No. 2005-10 (June 2, 2005) (See attached Exhibit 3.) The Plaintiffs admit in their Complaint (¶¶ 18,19 and 20) that the Defendant did that. Moreover, Plaintiffs concede in their Complaint (¶ 21) that FEMA has accepted the remedial action and announced that it is satisfied with the same and has no intent to disturb or void the grant.

The question then arises as to what purpose it would serve to have this Court go back and examine the purely academic question as to whether the Defendant’s September 4, 2018 meeting notice was deficient in some way. So that the Plaintiffs can use it to try to convince FEMA not to give the State and Nicholas County \$159.8 Million Dollars in federal funds to replace devastated schools? So that the Plaintiffs can gain a weapon to use to try to change the building site for the Richwood school?

The exercise of having such an academic question decided by this Court purely for the purpose of giving a party a cudgel to use to convince a non-party (FEMA) to do or not do something,

or to use as a sword to try to change something that is not at issue in this litigation (the building site) is the epitome of a non-justiciable controversy. The courts are not established to decide abstract issues. In fact, the West Virginia Supreme Court has repeatedly held that courts will not resolve mere academic disputes or moot questions or render mere advisory opinions which are unrelated to actual controversies. *State ex rel. Universal Underwriters Insurance Company v. Wilson*, 801 S.E.2d 216 (W. Va. 2017); *State Farm Mutual Automobile Insurance Co. v. Shatken*, 737 S.E.2d 229 (W. Va. 2012); *Harshbarger v. Gainer*, 403 S.E.2d 399 (W. Va. 1991); *Mainella v. Board of Trustees*, 27 S.E.2d 486 (W. Va. 1943).

Plaintiffs' counsel was correct when he stated in the Charleston Gazette interview that this matter is now moot. Any argument that the September 4, 2018 meeting notice was violative of the Act is now a purely hypothetical question the resolution of which will achieve nothing. *See* Syllabus Pt. 1, *State ex rel. Lilly v. Carter*, 60 S.E.2d 873 (W. Va. 1908) ("Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court.")

Because the issue presented in this case is moot and the Plaintiffs' Complaint amounts to a request for an advisory opinion on an academic question, this Court lacks subject matter jurisdiction to decide the matter. *See State ex rel. Universal Underwriters, supra*, at 223 ("Questions that may never arise or are purely advisory or hypothetical do not establish a justiciable controversy. Because an unripe claim is not justiciable, the circuit court has no subject matter jurisdiction over it.") Accordingly, this case should be dismissed pursuant to Rule 12(b)(1) of the West Virginia Rules of Civil Procedure for lack of jurisdiction over the subject matter.

WHEREFORE, based upon the foregoing, the Defendant respectfully requests that Plaintiffs' Complaint be **DISMISSED** with prejudice.

Respectfully submitted,

WEST VIRGINIA SCHOOL BUILDING
AUTHORITY,

By Counsel

PATRICK MORRISEY
ATTORNEY GENERAL

A handwritten signature in cursive script, appearing to read "Kelli D. Talbott", written over a horizontal line.

KELLI D. TALBOTT (WVSB #4995)
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Received

SEP 25 2018

SBA

THE LAW OFFICE OF JAMES M. BARBER

634 Virginia Street East, Suite 200
Charleston, West Virginia 25301

(304) 342-4616

Fax - (304) 342-4066

Sept. 24, 2018

Certified Mail-
Return Receipt Requested:

Attorney General Patrick Morrissey
Room 26, East Wing
State Capitol
Charleston, West Virginia 25305-0220

David Roach, Executive Director
School Building Authority
2300 Kanawha Blvd E.
Charleston, WV 25311

Re: Notice of institution of litigation against West Virginia School Building Authority

Dear General Morrissey and Mr. Roach:

Pursuant to W.Va. Code §55-17-3, you are hereby placed on notice that a complaint will be filed on behalf of certain residents of Nicholas County West Virginia against the WV School Building Authority as a result of actions taken regarding the Sept. 4, 2018 meeting of the SBA in violation of the West Virginia Open Meetings Law and in contradiction to the duties and responsibilities of the SBA.

In this litigation, we will seek to have the actions taken at the Sept. 4, 2018 meeting declared invalid and any votes taken annulled. We also will seek to recover attorneys' fees and costs.

While we are required by statute to wait to file the complaint, we respectfully ask that you take any and all actions necessary to ensure that the evidence surrounding this meeting, including minutes, notices and electronic communications, are preserved for use in the litigation.

EXHIBIT

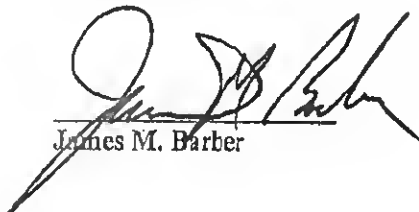
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Attorney General Patrick Morrisey.
Mr. David Roach
Sept. 24, 2018
Page 2

During this thirty-day period mandated by W.Va.Code §55-17-3, we remain open to discussing the issues that will be raised in the complaint with counsel for Defendant and we would gladly pursue a prompt resolution of this case, prior to filing the complaint. However, if no resolution is reached, once the thirty-day period from the date of this letter has passed, we will file the complaint and will provide the Attorney General a copy of the complaint, as required by W.Va.Code §55-17-3(b).

Respectfully yours,



James M. Barber

https://www.wvgazettemail.com/news/education/sba-may-redo-nicholas-school-rebuilding-vote-after-lawsuit-notice/article_4a14aa87-7565-5584-b3b0-f5a55468ab49.html

SBA may redo Nicholas school rebuilding vote after lawsuit notice

By Ryan Quinn Staff writer Oct 16, 2018

The West Virginia School Building Authority's board might redo a Sept. 4 vote regarding Nicholas County school rebuilding and consolidation after an attorney filed a notice of a planned lawsuit.

Charleston-based attorney James Barber said the lawsuit would allege that the SBA violated open-meetings laws by not sufficiently making the public aware of the meeting's purpose ahead of time and not publicly providing related documents.

Stu Matthis, a North Carolina resident and vice president/senior engineer at STV Engineers, said Barber is working on behalf of the Richwood High School Alumni Association, of which he said he and Barber are members.

Barber said he's working on behalf of three parents of children who either currently are or will attend Richwood High, but he declined to give the planned plaintiffs' names. He said he does believe all three mothers are members of the alumni association.

"The Monday meeting moots the suit, so the suit's never going to be filed," Barber said. Thus, he said, there's no reason to reveal the plaintiffs' names.

The SBA has posted a meeting notice on the secretary of state's website for 10 a.m. Monday at the SBA office, at 2300 Kanawha Blvd. E., in Charleston.



The listed purpose of the meeting was "To approve the Alternative Procedure (428) Agreement for Nicholas County Schools for construction of facilities, compliant with the Nicholas County CEFP [comprehensive educational facilities plan] Amendment."

"We're just correcting it, so, I guess, there can't be a lawsuit," SBA Executive Director David Roach said. "Or nullify it. That's our attorney's recommendation; that's what we followed."

Roach said the recommendation was from Senior Deputy Attorney General Kelli Talbott.

"We don't know that we were wrong," said SBA Architectural Services Director Ben Ashley, who joined Roach in a Tuesday interview.

Ashley said "having this meeting again, we can just render that argument ..."

"Moot," Roach interjected. Ashley concurred.

It was unclear from the Sept. 4 meeting if SBA board members knew exactly what they were voting on.

That same day, the Nicholas County Board of Education approved accepting what its superintendent said was about \$159.8 million from the Federal Emergency Management Agency to build combined schools.

Those schools will replace some buildings that were closed — and some that weren't — after a devastating June 2016 flood.

The Nicholas school board now plans for one school in Richwood. Cherry River Elementary, the single Richwood school not demolished after the flood, is to be renovated and expanded to accommodate the middle and high school students whose buildings were destroyed.

A FEMA spokesperson wrote in an email Tuesday that "September 25, 2018 was the deadline to have the Sandy Recovery Improvement Act (SRIA) agreement signed by the WV SBA and NCBOE. The deadline was met by both parties." That act is often referred to as "428."

Nicholas schools Superintendent Donna Burge-Tetrick has said the 428 program's primary benefit is that it allows the county to combine schools, something it wouldn't have been allowed to do with the federal money under the "traditional" FEMA procedures.

When asked if FEMA was aware that the SBA board is meeting again on this issue next week over alleged open-meetings act violations, an agency spokesperson said yes.

"The required signatures for participation in the Public Assistance Alternative Procedures Program were submitted to FEMA prior to the deadline, thus, the SBA meeting outcome does not affect participation in the program," the spokesperson said.

Barber said the lawsuit was not meant to scuttle the 428 plan or the plan for two schools, "it's simply that they make the best choice for a site in Richwood."

He previously wrote to SBA board members "on behalf of concerned residents of Richwood" who support using the "Collins" site for Richwood Middle and Richwood High, rather than rebuilding the schools onto Cherry River Elementary.

Roach said he plans to let the advocates for the Collins site present arguments at Monday's meeting.

Reach Ryan Quinn at ryanquinn@wvgazette.com, facebook.com/ryanedwinquinn, 304-348-1254 or follow @RyanEQuinn on Twitter.

Ryan Quinn
Education Reporter

OPEN MEETINGS ADVISORY OPINION NO. 2005-10

Issued On June 2, 2005 By The

WEST VIRGINIA ETHICS COMMISSION
COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The Huntington City Council asks for guidance in complying with the requirements of the Open Meetings Act. The Council seeks to verify whether a subordinate board can meet to discuss the qualifications of applicants for employment without giving notice of their meeting. Further, the Council wants to know what steps are required to rectify a situation where a governing body conducts a meeting that does not conform to the requirements of the Act but, nonetheless, official action needs to be taken on matters that were previously addressed during such meeting.

FACTS RELIED UPON BY THE COMMITTEE

The Council request explains that the governing body of a subordinate municipal agency went into executive session at a regularly scheduled meeting to discuss the hiring of a new employee. The meeting adjourned after the conclusion of the executive session without a vote being taken or a decision made.

The board members subsequently gathered in a private office at another location where they continued to discuss the qualifications of the applicants for an available position. During this subsequent gathering, the participants reached a consensus on the best applicant and submitted their recommendation to the Mayor and Council without conducting a properly noticed open meeting.

Pursuant to guidance from the City Attorney that the private meeting was not in compliance with the Open Meetings Act, the governing body met again in a properly noticed meeting where the employment question was discussed. Following public discussion on this matter, the board voted to make the same personnel recommendation.

The City Council asks for guidance on what steps are necessary to correct an apparent violation of the Open Meetings Act.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-3 provides, in pertinent part, as follows:

Except as expressly and specifically otherwise provided by law, whether heretofore or hereinafter enacted, and except as provided in section four of this article, all meetings of any governing body shall be open to the public. . . . Upon petition by any adversely affected party any court of competent jurisdiction may invalidate any action taken at any meeting for which notice did not comply with the requirements of this section.



In addition, W. Va. Code § 6-9A-6 states, in pertinent part:

The circuit court in the county where the public agency regularly meets has jurisdiction to enforce this article The court is empowered to compel compliance or enjoin noncompliance with the provisions of this article and to annul a decision made in violation of this article. An injunction may also order that subsequent actions be taken or decisions be made in conformity with the provisions of this article. . . . In addition to or in conjunction with any other acts or omissions which may be determined to be in violation of this article, it is a violation of this article for a governing body to hold a private meeting with the intention of transacting public business, thwarting public scrutiny and making decisions that eventually become official action.

W. Va. Code § 6-9A-7 further provides:

(a) Any person who is a member of a public or governmental body required to conduct open meetings in compliance with the provisions of this article and who willfully and knowingly violates the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than five hundred dollars: Provided, That a person who is convicted of a second or subsequent offense under this subsection is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars.

(b) A public agency whose governing body is adjudged in a civil action to have conducted a meeting in violation of the provisions of this article may be liable to a prevailing party for fees and other expenses incurred by that party in connection with litigating the issue of whether the governing body acted in violation of this article, unless the court finds that the position of the public agency was substantially justified or that special circumstances make an award of fees and other expenses unjust.

ADVISORY OPINION

The Open Meetings Act generally requires that governing bodies of public agencies provide reasonable advance notice to the public and media of any meeting where a quorum of the governing body will be present and where matters requiring official action will be decided or discussed. Personnel matters, such as determining the best applicant to fill a vacant position, may be discussed in executive session, but each such session must be initiated and concluded in the context of a properly noticed open meeting.

Members of a governing body who knowingly and intentionally conduct a meeting in violation of the Act are subject to criminal prosecution. Any violation of the Act, even an inadvertent failure to issue an agenda for a regularly scheduled meeting, may generate a legal action requiring rescission of official action taken by the governing body.

The Act contains no guidance on "curing" a violation of the Act that was not knowingly and willfully committed, and this Committee has not previously addressed this issue. However, this Committee finds that a violation of the Act can be rectified, if a governing body takes reasonable remedial measures over and above ceremonial and perfunctory ratification of the official action previously taken. In particular, the following actions should be taken:

(1) At least three business days' notice of the meeting where the matter or matters will be reconsidered shall be made available in the same manner as notice of any regular or special meeting of the governing body. The meeting notice will include a description of the matters being reconsidered or a description of those matters may be included in a meeting agenda issued at the same time as the meeting notice. For purposes of this guidance, "business days" does not include Saturdays, Sundays, legal holidays or the day of the meeting.

(2) The matter being reconsidered shall be open for free and full discussion by the voting members of the governing body. In addition, before any decision is made or vote taken, there shall be an opportunity for public comment on the matter being reconsidered.

(3) The governing body shall, as a minimum, make an audio recording of the open portion of the meeting where the reconsideration occurs, and maintain that recording as a public record for six months.



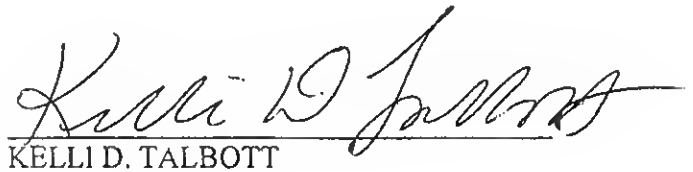
Chairman

CERTIFICATE OF SERVICE

FILED

I, Kelli D. Talbott, Senior Deputy Attorney General, counsel for the West Virginia
School Building Authority, do hereby certify that true and exact copy of Defendant's Motion to
Dismiss was served by depositing the same postage prepaid in the United States Mail, this 3rd
day of December, 2018, addressed as follows:

James M. Barber, Esquire
The Law Office of James M. Barber
604 Virginia Street, E. Suite 200
Charleston, WV 25301


KELLI D. TALBOTT